

CON Task Force Issue Brief

Interested Parties

Statement of the Issue

Should the standard for becoming an “interested party” be changed?

Summary of Public Comments

The Task Force received specific comments from three persons representing two organizations:

- **William L. Jews**, President and CEO of CareFirst and **Hal Cohen** of Health Care Consulting both submitted comments on behalf of **CareFirst**
- **William G. “Bill” Robertson**, President and CEO of **Adventist HealthCare** submitted comments for that health system

CareFirst

CareFirst’s comments suggest that it not be required to meet the interested party standard for “payers” in COMAR 10.24.01.01B(16)(c) for any proposed capital projects exceeding \$25,000,000. CareFirst claims that the standard is “cumbersome” and “inappropriate.” CareFirst argues that, as Maryland’s largest private sector health insurer, it pays for a substantial share of the admissions and outpatient visits to all Maryland hospitals and so should automatically be an interested party in large capital hospital projects. CareFirst also believes that the comments that it provides concerning a CON project need not be negative in order to obtain “interested party” status. Filing positive comments should similarly make interested party “rights” (the rights to request oral argument, file exceptions and appeal adverse rulings by the Commission) available to it.

Adventist HealthCare

Adventist HealthCare believes that “interested party” status should be made more difficult to obtain. Adventist suggests that projects “get bogged down” by opposing parties who are not materially affected but, instead, merely wish to slow down the project’s approval or negatively affect the applicant in some other manner.

Background

Table 1 summarizes the chronology of changes in “interested party” status for certificate of need proceedings. In general, the changes (in and of themselves) have probably had little net effect in

either reducing or increasing the number of interested parties to certificate of need proceedings. For example, the 1995 elimination of residency in an affected service area as an automatic qualification for interested party status (a criterion since approximately 1982) was likely offset by creation of an “others” category including anyone demonstrating that project approval could have a potentially detrimental impact on an issue area subject to Commission regulation.

Brief History of Interested Party Status

Under requirements established in 1982, a party became an “interested party” to a certificate of need review by satisfying two sets of conditions. First, the party had to be one of nine, specifically identified persons or entities (e.g., applicants, local health planning agencies for the local or neighboring health service area, a person residing or regularly using health care facilities within the geographic area to be served, third party payors paying in the service area, etc.). Second, the party had to request copies of relevant notices.¹ Interested party status conferred standing to request and participate in an evidentiary hearing² (though the interested party was required to identify specific issues which it would address), request reconsideration and pursue judicial review.

These conditions changed slightly around 1985. Potential parties were given 2 additional alternatives to invoking interested party status (in addition to requesting copies of relevant notices):

Alternative 1

- request an evidentiary hearing within 45 days of the docketing of the application;
- appear at the first pre-hearing conference; and
- identify deficiencies

Alternative 2

- appear at first prehearing conference; and
- gain permission of hearing officer in accordance with Administrative Procedure Act standards

Greater changes occurred in 1995. Commission staff were explicitly designated as an automatic “interested party”; local governments were added; competitor facilities could participate but were required to offer the “same service” to automatically qualify as interested parties; and third party payors were newly required to “demonstrate substantial negative impact” on overall costs to the health care system. Some specific categories of interested parties were eliminated; a general set of qualitative/quantitative standards to be met by persons seeking interested party status, “others”, was introduced (e.g., requirement to show substantial depletion of essential personnel or other resources, etc.).³ Also, the procedure for invoking interested party status was simplified

¹ Currently anyone may request notices, without regard to interested party status.

² They had to pre-file the testimony of their witnesses and could question or cross-examine other witnesses, introduce evidence, participate in oral argument and file memoranda.

³ For parties attempting to show that they are “adversely affected” and so fitting one category of “interested parties”:

to the sole requirement of filing comments within 30 days of the docketing of a certificate of need application.

The Commission has not made significant changes to the interested party provisions since 1995.

Interested Party Status

An institution seeking a certificate of need must file a “letter of intent” with the Commission. The letter of intent identifies the person or institution on whose behalf the certificate of need will be issued, describes the proposed project, indicates the quantity of beds or health services involved and identifies the specific location of and each jurisdiction in which services will be provided. The Commission forwards letters of intent to the *Maryland Register* for publication.

Publication in the *Maryland Register* informs other individuals or entities of the proposal. Those who believe that the granting of a certificate of need may affect them might wish to intervene in the application process in order to bring additional facts or points of view to the Commission’s attention. One (but not the only) mechanism to accomplish this goal is to seek and achieve “interested party” status.

Attaining “interested party” status brings procedural privileges to the party who receives it. See Table 1. Becoming an “interested party” confers the opportunity to comment on any aspect of the application. An interested party may, in the discretion of the Reviewer⁴, be allowed to offer oral argument to the Reviewer prior to a proposed decision being drafted.⁵ An interested party may request an evidentiary hearing⁶, file written exceptions to a certificate of need decision proposed by the Reviewer⁷ and present oral argument to the Commission prior to the Commission’s final

(1) “Adversely affected”, for purposes of determining interested party status in a Certificate of Need review, as defined in §B(16) of this regulation, means that a person:

(a) Is authorized to provide the same service as the applicant, in the same service area used for purposes of determining need under the State Health Plan or in a Contiguous service area if the proposed new facility or service could reasonably provide services to residents in the Contiguous area;

(b) Can demonstrate that the approval of the application would materially affect the quality of care at a health care facility that the person operates, such as by causing a reduction of volume of services when volume is linked to maintaining quality of care;

(c) Would suffer a substantial depletion of essential personnel or other resources by approval of the application by the Commission; or

(d) Can demonstrate to the reviewer that the person could suffer a potentially detrimental impact from the approval of a project before the Commission, in an issue area over which the Commission has jurisdiction, such that the reviewer, in the reviewer’s sole discretion, determines that the person should be qualified as an interested party to the Certificate of Need review.

While sections (a), (b) and (c) are fairly straightforward, section (d) is a “catchall” which gives the Reviewer rather wide latitude because it does not require that any precise standard be met (“could suffer a potentially detrimental impact”) and leaves the determination to the Reviewer’s “sole discretion.”

⁴ A “Reviewer,” according to the Commission’s regulations, is one Commissioner, appointed by the Executive Director of the Commission, who evaluates all aspects of a Certificate of Need application and prepares a Proposed Decision for the Commission’s consideration. An interested party may request the opportunity for argument before the Reviewer.

⁵ Maryland Code Annotated, Health – General §19-126(10)(i).

⁶ Maryland Code Annotated, Health – General §19-126(f).

⁷ Maryland Code Annotated, Health – General §19-126(d)(11).

decision.⁸ Lastly, an interested party “aggrieved” by the Commission’s final decision may petition the Commission to reconsider.⁹ An interested party also enjoys a statutory right of appeal to Circuit Court.¹⁰

Issues and Options

Issues

The problem of identifying “interested parties” reveals the inherent tension between fairness and efficiency in agency practice. The Commission’s enabling legislation and regulations seek to maximize the potential for all relevant information to come to the Commission’s attention when making a CON decision. One means to accomplish this is the statute’s creation of a special class of non-applicants as “interested parties”. Interested party status carries procedural privileges to be heard, to protest and to appeal. However, increasing the number of parties with procedural privileges can increase the length and complexity of the Commission’s proceedings and impose burdens and delays on the primary applicants. It also places additional demands on the Commission’s resources (Commissioners, staff, counsel, material and equipment) and, compared to uncontested applications, can increase the rigidity of the review process.

Options

The Commission’s options in restricting the number of non-applicant, “interested parties” are constrained both by statutory obligations and due process requirements (as defined under the common law). The General Assembly has imposed a statutory “floor” for defining the group of persons/entities who can be interested parties. That group must include, but is not limited to:

- 1) Commission staff;
- 2) Competing applicants;
- 3) Others who can demonstrate that they would be “adversely affected” by the decision of the Commission on the application; and
- 4) The local health planning agency for the affected jurisdiction/region.

The primary differences between the statutory floor and current Commission practice in defining interested parties are that Commission regulations¹¹:

- 1) Include health departments;
- 2) Specifically identify third party payors showing “substantial negative impact on overall costs” as interested parties; and
- 3) Specifically define “adversely affected” to include:
 - persons in the same or neighboring area offering the same service;
 - persons demonstrating that application approval would materially affect quality of care at their facilities;

⁸ Maryland Code Annotated, Health – General §19-126(d)(11).

⁹ Maryland Code Annotated, Health – General §19-126(h).

¹⁰ Maryland Code Annotated, Health – General §19-128.

¹¹ COMAR §10.24.01.01B(2) and 10.24.01.01B(20).

- persons suffering substantial depletion of essential personnel or other resources by application approval; and
- persons demonstrating they ***could suffer a potentially detrimental impact from the approval . . . in an issue area over which the Commission has jurisdiction . . . such that the review, in the reviewer's sole discretion, determines that the person should be qualified as an interested party.*** [emphasis added]

For legal and practical purposes, the Commission's potential changes to interested party status are limited to altering the treatment of third party payors and/or restricting (or expanding) how the Commission defines "adversely affected". Under common law, agencies are permitted to adopt "reasonable regulation[s] specifying criteria for administrative standing".¹² The reasonableness of the regulation presumably relates to the types and weights of the interests recognized by the agency as conferring standing and to the agency's need to limit the number of persons able to intervene in the administrative process.

Third Party Payors

The Commission may drop the requirement that a third party payor show substantial negative impact on overall costs to the health care system and allow all third party payors to become, automatically, interested parties. This would reduce the process burden on third party payors and provide, in the setting of a certificate of need review, direct influence. However, such a change might reasonably be expected to increase the number of interested parties involved in certificate of need reviews and, over the long term, the complexity and duration of the certificate of need review process at the Commission.

Alternatively, the Commission may choose not to provide a special mechanism for any third party payors to participate as interested parties. The rationale for this action would be to reduce (potentially) the number of parties directly involved in the certificate of need review and, therefore, enhance the speed and efficiency of the process. This step might reasonably be taken should the Commission determine that the perspective contributed by third party payors – consideration of system-wide health care cost effects consequent to health services expansion – is already adequately represented. This role is played by competing service providers and/or applicants, Commission staff and the Health Services Cost Review Commission analyses and reports (which are incorporated into the certificate of need review process).

Defining "adversely affected"

The Commission's early regulations explicitly allowed anyone residing in an affected service area or regularly using its health services/facilities to attain interested party status. See above. Subsequent iterations replaced these categories – and others – with a variant of the "adversely affected" test described above.

The Commission's enabling legislation specifies that the Commission must recognize persons as "interested parties" who are "adversely affected" – but the legislation does not explain the measurement of "adverse effect". Commission regulations elaborate on its measurement by providing explicitly that persons offering the same services in the same or neighboring areas, persons showing a material effect on quality of care at their facilities and persons suffering substantial depletion of resources are "adversely affected". A fair reading of the underlying

¹² E.g., Sugarloaf Citizens' Assoc. et al. v. Dep't of Environment, 344 Md. 271, 286 (1996).

statute suggests that these are clearly the kinds of “adverse effects” intended by the General Assembly.

However, the Commission is more generous than the General Assembly requires by also recognizing as interested parties any person who can show a “potentially detrimental impact” from approval of a certificate of need application.¹³ Therefore, eliminating the “potentially detrimental impact” test from Commission regulations is one possibility for limiting the number of interested parties. It could be replaced by reiterating the statute’s exact language – “demonstrate that the person would be adversely affected by the decision of the Commission on the application”¹⁴ – with the proviso that the adverse affect must be in an issue area over which the Commission has jurisdiction (as in current regulations).

It is not clear that, as a practical matter, this change alone would reduce the number of interested parties appearing before the Commission.¹⁵ To further tighten the requirements, it may be legally permissible for the Commission to specify that interested parties must be persons who are:

- 1) directly affected by the outcome of the certificate of need proceeding; and
- 2) affected in a different and more substantial way than the public in general (whose interests are represented by the Commission itself).

Members of the general public would be invited to provide written comments on any matter before the Commission, but need not necessarily be accorded the status of interested parties.

Legislative changes

The Commission relies, at least in part, on interested parties’ participation to bring out all relevant information and perspectives during agency review. This role is respected and important both in the Commission’s practice and under the law.

Nevertheless, it is possible to imagine careful legislative changes streamlining the certificate of need review process by more tightly controlling the numbers of interested parties. For example, §19-126(d)(8)(iii) (and related provisions) could be amended to remove the broad “any other person who can demonstrate . . . adversely affected” standard. The Commission could be left with full latitude to control the administrative process with reference only to the requirements of the Administrative Procedure Act and constitutional guarantees of due process.

Alternatively, the standard could be re-designed to attempt to draw a distinction between members of the general public specially and differently affected and all others. The legislation could also specifically envision a “public comment” mechanism in certificate of need reviews separate and apart from the achievement of interested party status.

¹³ Commission regulations explicitly limit the impact to those occurring in issue areas over which the Commission has jurisdiction – the statute does not. The Commission takes the position that this limitation is reasonable in light of the need to narrow the range of effects the Commission might be called upon to consider for which the agency does not possess special expertise, e.g., zoning, traffic, pollution, etc.

¹⁴ This language is already at COMAR §10.24.01.01B(20).

¹⁵ In fact, the additional publicity generated by such a change might initially attract more.

Conclusion

Interested party status is important because of the procedural privileges it affords. Comments have been received by the Task Force both seeking expansion of interested party status and recommending its limitation. “Interested party” status is determined both by statute and by regulation. The legislation and regulations have changed several times during the last two decades but these changes, alone, have probably had little net effect on the number of parties achieving interested party status.

The General Assembly and the Commission have similar interests in properly identifying interested parties. A well-structured interested party mechanism offers greater certainty that important information relevant to the Commission’s decisions regarding certificates of need will come to its attention. On the other hand, increasing the number of parties with procedural privileges can increase the length and complexity of the Commission’s proceedings and impose burdens and delays on the primary applicants.

The problem of identifying “interested parties” reveals the inherent tension between fairness and efficiency in agency practice. The General Assembly has set minimum standards for those who must be considered interested parties. The Commission’s standards arguably exceed these and offer that status to a greater class of persons than is required. Options include further expanding interested party status to guarantee automatic inclusion to a wide range of parties (e.g., all third party payors) or restricting that status to a smaller number of directly, specially affected persons whose views are not likely to be adequately represented by any other class of Commission participants.

Table 1: Review of changes to "interested party" provisions

	c.1982 (COMAR supplement 19)	c.1986	1995	2005
Parties				
Applicant	•	•	•	•
Commission staff			•	•
Local health planning agency	•	•	• Or governing authority	• Local health department or health department in applicable planning region
Neighboring local health planning agency	•	•		
Residents of the service area or persons to be served	•	•		
Persons using facilities in the area	•	•		
Facilities / HMOs / persons in the service area	• Similar service	• Similar service	• Same service	• Same service in planning region
Facilities / HMOs / persons in neighboring area with similar services			• Same service & new applicant could spill over	• Same service & new applicant could spill over into planning region
Entities filing letters of intent for similar services	•	•		
Third party payors	• Must pay in service area	• Must pay in service area	• Must demonstrate substantial negative impact on overall costs to health care system	• Must demonstrate substantial negative impact on overall costs to health care system
Rate setting agencies for the service area	•	•		
Others			• Suffer substantial depletion of essential personnel or other resources; or material affect quality of care at own facility; or demonstrate potential detrimental impact in area of Commission regulation by approval of project (discretionary)	• Suffer substantial depletion of essential personnel or other resources; or materially affect quality of care at own facility; or demonstrate suffering potential detrimental impact in area of Commission regulation by approval of project (discretionary)
Procedures				
Written request for copies of relevant notices	•	•		
Written request for evidentiary hearing		• Alternative to gain interested party status (45 days from docketing); must also appear at first prehearing conference; must identify deficiencies		
Appearance at first prehearing conference plus permission of hearing officer in accordance with APA		• Second alternative to gain interested party status		
Written comments			• Comments within 30 days of docketing. Opposing comments must state with particularity the challenged standards or review criteria	• Comments within 30 days of docketing. Opposing comments must state with particularity the challenged standards or review criteria
Rights				
Participate in evidentiary hearing, including offering evidence	• Can request hearing & participation, in writing, & must identify issues	• Can request hearing & participation, in writing, & must identify issues	• Can request & participate in evidentiary hearing	• Can request and participate in evidentiary hearing
Present arguments & make motions	•	•	•	•
Oral argument before reviewer			•	•
Exceptions hearing			•	•
Request for reconsideration & Judicial Review	•	•	•	•